No. 80-1360

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GENERAL ATOMIC COMPANY,
Appellant,

v.

UNITED NUCLEAR CORPORATION,

and

INDIANA & MICHIGAN ELECTRIC COMPANY,
Appellees.

On Appeal From
The Supreme Court of New Mexico

BRIEF OF THE GOVERNMENT OF CANADA AS *AMICUS CURIAE*

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BRIEF OF THE GOVERNMENT OF CANADA AS *AMICUS CURIAE*

The Government of Canada hereby appears as *amicus curiae* and files this brief with the consent of all parties.[1] The pending appeal from the Supreme Court of the State of New Mexico seeks review of an order affirming the entry of a Sanctions Order and Default Judgment against appellant General Atomic Company. This filing represents the official position of the Government of Canada and was specifically approved and authorized at the Ministerial level.

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[1] The Government of Canada previously appeared before this Court as *amicus curiae* in this case on petitions for writs of certiorari in the 1977 Term (Nos. 77-1236 and 77-1269). See Brief of the Government of Canada as *Amicus Curiae*, dated April 17, 1978.

THE INTEREST OF CANADA

This case is one of a number of pending proceedings in which courts in the United States have been asked to inquire into an international uranium marketing arrangement established by Canada and other foreign governments.[2] The Government of Canada has a deep and continuing interest in these actions insofar as they threaten the Government's ability to implement its uranium resource policy and to ensure compliance with Canadian laws and regulatory policies.

In the Canadian Government's view, it is highly objectionable that actions of the Canadian uranium industry, taken outside the United States in accordance with Canadian law and in response to its declared national policy, should give rise to judicial inquiry in the United States and to possible liability under United States law. It is likewise objectionable for courts in the United States to impose discovery and sanctions orders the effect of which is to compel persons to produce documents from Canada contrary to Canadian criminal law or to face massive default judgments. Such actions by courts in the United States are inconsistent with firmly established doctrines of comity and international law, and cannot but

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[2] The other pending cases are In re Uranium Antitrust Litigation, Westinghouse Electric Corp. v. Rio Algom, Ltd., MDL No. 342 (N.D. Ill., filed October 15, 1976); In re Tennessee Valley Authority Uranium Antitrust Litigation, No. 342A (N.D. Ill., filed November 18, 1977); General Atomic Co. v. Exxon Nuclear Co., Civil No. 78-0223-E (S.D. Cal., filed April 7, 1978); and Reserve Oil & Minerals Corp. v. General Atomic Co., No. Civ. 77-592-JB (D. N.M., filed September 22, 1977). In the first three of these cases, the district courts have denied motions questioning the court's jurisdiction over conduct pursuant to foreign government policy; in the fourth case, such motion is pending. In the first three of these cases, there are also motions pending to impose sanctions for failure to produce documents located in Canada, production of which is prohibited by Canadian law.

have deleterious effects upon the relations between the two countries.

Canada has endeavored to inform the various courts in the U.S. in which these issues are presented of its role in the international uranium marketing arrangement, and to describe the scope of Canadian laws, policies and actions respecting regulation of its uranium trade. This was first done by diplomatic notes; thereafter, on the advice of the State Department resulting from the guidance of this Court, such representations have taken the form of *amicus* filings. Regrettably, the courts have failed to fully consider and to accord appropriate weight to Canada's official statements. Supreme Court guidance is called for on the jurisdictional issues presented by this appeal, on the propriety of judicial sanctions for non-production of documents because of prohibition of foreign law, and on the deference to be accorded official statements of a friendly foreign government.

DISCUSSION

1. The jurisdictional statement on this appeal sets forth questions concerning the exercise of jurisdiction by American courts which are important to the sovereign authority of the Government of Canada and its ability to effectuate regulatory policies and programs. Integral to relations between friendly nations is a respect for each other's laws and policies. Action (including judicial action) should be avoided which would intrude upon the sovereign authority of another nation or penalize persons for conduct in compliance with its laws and policies.

Principles of international law and foreign relations preclude the exercise of jurisdiction by courts in the United States over conduct of the Canadian uranium industry outside the U.S. in compliance with and in implementation of Canadian laws and policies. The standards for such jurisdictional limits or restraints have been vari-

ously expressed—by use of rubrics such as act of state, sovereign compulsion and international comity. However expressed, the obligation of American courts to limit their exercise of jurisdiction is established by the following basic facts concerning the Canadian regulatory program.[3]

First, Canada has had a comprehensive regulatory system for its uranium resource industry since the birth of the industry in the 1940s. From the outset, it has exercised its sovereign prerogative to actively supervise and regulate virtually every aspect of this industry ranging from exploration and mining to export sales. Canada's uranium industry was vigorously promoted, primarily to meet the United States' needs, and it became a substantial factor in Canada's overall resource development program and national economy.[4]

Second, since 1969, Canada's regulatory system has included governmental review and approval of the prices, quantities and other terms of all contracts for the export of uranium. Governmental review is by Canada's Atomic Energy Control Board, acting with the advice and under the direction of the responsible ministers, either under general ministerial directives or on a transaction-by-transaction basis. All export prices and quantities are therefore explicitly regulated by the Canadian Government.[5]

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[3] A complete statement of the Canadian Government's position on jurisdiction and of its laws, policies and actions in the uranium industry was set forth in a memorandum *amicus* filed in another pending case on July 1, 1980 and included in appellant's Appendix to the Jurisdictional Statement, J.S. 489a-512a.

[4] *See* Atomic Energy Control Act 1946, S.C. 1946, c. 37; Atomic Energy Control Act, R.S.C. 1970, c. A-19.

[5] Atomic Energy Control Act, R.S.C. 1970, c. A-19, Sec. 9; Atomic Energy Control Regulations, Sec. 201, P.C. 1972-1719; Sec. 7(5), P.C. 1974-1195. Since the termination of the international marketing arrangement in 1975, the Atomic Energy Control Board has continued to regulate export contracts on a transaction-by-transaction basis after review by an interdepartmental panel.

Third, Canada took the initiative in formulating and implementing an international marketing arrangement for uranium which functioned for about three years, 1972 to 1975. This was undertaken by Canada and other producing nations (Australia, France, South Africa) in direct response to a United States embargo which closed 70 percent of the free world market to non-U.S. producers and threatened the collapse of the Canadian industry. The purpose of the international arrangement was to stabilize the industry by allocating non-U.S. supply and demand and setting minimum prices during a transitional period. The arrangement did not govern sales for ultimate use in the participating countries or in the United States.

Fourth, Canada secured the participation of all Canadian uranium producers in the international marketing arrangement. It directed officials of the two Government-owned companies to participate in meetings of the international marketing arrangement which discussed and arrived at proposed prices and quantities of export sales.[6] The participation of private Canadian uranium producers was secured by the Government; it made clear that such participation was expected in the national interest and that the determinations reached under the uranium marketing arrangement would be enforced by government regulatory authority, including control over export permits. While Canada's participation in the international arrangement terminated in 1975, its regulatory control over the price and other terms of export contracts continues.

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[6] The officials of the Canadian Crown corporations, Uranium Canada Limited and Eldorado Nuclear Limited, were acting as agents of the Government. The Uranium Canada officials were also officials of the Ministry of Energy, Mines and Resources and reported the results of meetings directly to the Government through their Ministry.

Because of the Canadian Government's role in the international marketing arrangement, the jurisdictional issues presented on this appeal are of substantial concern to the Government of Canada.

2. Just as Government and company participation in the international marketing arrangement was a vital component of Canada's uranium regulatory program, so was the enactment and enforcement of its Uranium Information Security Regulations. These Regulations prohibit the disclosure of documents or their contents which are located in Canada and which relate to uranium exporting or marketing during a specified period, 1972 to 1975, subject to substantial criminal penalties.[7]

The Regulations were promulgated because Canada considered it contrary to its sovereign prerogatives for foreign tribunals to question the propriety or legality of the actions of Canadian uranium producers that were taken outside the United States and were required by Canadian law or performed in implementation of Canadian Government policy. The role of the Regulations in protecting the integrity of the Canadian Government's policy with respect to the uranium industry was confirmed by the Supreme Court of Canada in denying letters rogatory. *Gulf Oil Corp.* v. *Gulf Canada Ltd.*, 111 D.L.R. [3d] 74 (Can. S. Ct. 1980).[8]

Canada's sovereign authority to secure compliance with its own laws and policies would be impaired by the imposition of default or other sanctions because of a party's

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[7] P.C. 1976-2368, amended by P.C. 1977-2923 as of October 13, 1977. The maximum penalty for violation of the Regulations is imprisonment for up to five years and a fine not to exceed $10,000. Atomic Energy Control Act, R.S.C. 1970, c. A-19, Sec. 19(1).

[8] The Court pointed out that the documents covered by the Regulations "are not simply private documents" but reflected the input and expressions of Governmental representatives. Gulf Oil Corp. v. Gulf Canada Ltd., 111 D.L.R. [3d] at 91.

failure to produce documents or information, the disclosure of which is prohibited by Canadian law. For that reason, the imposition of the default is a matter of substantial concern to the Government of Canada.

3. Official statements of foreign governments on the nature and scope of their laws, policies and actions are acts of state which should not be subject to question or impeachment in United States courts. Carefully circumscribed independent judicial inquiry may be appropriate when, as in this case, there are allegations of conduct going beyond the scope of the foreign government's involvement. However, this can and should be accomplished in a way that avoids conflict with the foreign government. Allegations of conduct of American companies in the United States which are clearly beyond the scope of Canadian law or interest can be inquired into without asserting jurisdiction over Canada's regulatory laws, policies and actions, or questioning the validity or veracity of Canada's statements as to its laws, policies and actions.

The Government of Canada has endeavored to follow the procedure recommended by the State Department, resulting from advice of this Court, that its views should be presented directly to U.S. courts in the form of *amicus curiae* filings. Briefs and memoranda *amicus* have been submitted to the various courts in which the uranium cases are pending. The results have been regrettable and frustrating. Courts have largely ignored them [9]

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[9] In General Atomic Co. v. Exxon Nuclear Co., No. 78-0223-E (S.D. Cal., filed April 7, 1978), the Court granted the Government of Canada leave to appear as *amicus curiae* and file a brief on a pending jurisdictional motion. After receiving Canada's statements, the Court nevertheless held that the "scope of foreign government involvement in the cartel has [not] been conclusively established" General Atomic Co. v. Exxon Nuclear Co. (Oct. 9, 1980) (denying motion for reconsideration of motion for partial summary judgment) at 2. It is difficult to ascertain what effect, if any, the Court

or treated Canada's and other government's comments in such manner as to leave foreign governments uncertain how to proceed in the future.[10] In one case, the State Department took the very unusual step of informing the court of the serious foreign policy implications of its treatment of foreign governments' filings.[11] In the pres-

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gave to Canada's statement of the scope of its actions, laws and policies.

[10] The Court of Appeals for the Seventh Circuit, in In re Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980), characterized Canada and other foreign governments who filed *amicus* briefs as "surrogates" of certain defaulting parties and stated that, "shockingly to us, the governments of the defaulters have subserviently presented for them their case against the exercise of jurisdiction." *Id.* at 1256.

In In re Uranium Antitrust Litigation, Westinghouse Electric Corp. v. Rio Algom, Ltd., MDL No. 342 (N.D. Ill.), in ruling upon various motions for partial summary judgment on jurisdictional grounds, the Court disposed of the concerns of Canada and other foreign governments by remarking, "I do not believe that the future of the crown teeters in the balance of this litigation" (Tr. Dec. 17, 1980 at 8). *See also* In re Uranium Antitrust Litigation, 480 F. Supp. 1138 (N.D. Ill. 1979) (Court accepted foreign governments' statements as *amicus curiae* but declined to defer to foreign law insofar as production orders were concerned).

[11] The Department of State, through the Justice Department, informed the Seventh Circuit that its criticism of friendly foreign governments (see preceding note) had caused "serious embarrassment to the United States in its relations with some of our closest allies." The State Department emphasized the "genuineness" of the concerns of the foreign governments and pointed out that it had encouraged their appearances *amicus curiae*. Letter from Roberts B. Owen, Legal Adviser, Department of State, to John H. Shenefield, Associate Attorney General, Department of Justice, dated March 17, 1980, sent to the Seventh Circuit by the Associate Attorney General at the Legal Adviser's request.

In the same case, the Justice Department thereafter wrote the United States District Court in the Northern District of Illinois to communicate its formal statement of interest. The letter stated

ent case, the Supreme Court of New Mexico described Canada's laws and policies in a manner inconsistent with the Canadian Government's official statements and refused to consider the representations made by Canada in briefs *amicus curiae* in other cases, tendered for its consideration.[12]

The procedure of *amicus* filings has also had the consequence of eliminating the Executive Branch's traditional role as the intermediary for foreign government interests in matters before American courts. The absence of advice by the Executive Branch in these cases has apparently contributed to the lower courts' reluctance or unwillingness to give fair consideration to the views of foreign governments. The courts appear to assume that the lack of Executive Branch comment indicates either lack of interest or lack of importance of the foreign government's views and thus the lack of a foreign relations dimension.[13] This suggests that the Court should consider encouraging the United States Government to resume its

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that the proceeding in that court "implicates foreign policy concerns of both the United States and foreign governments," referred to "the intensity and authenticity" of the foreign governments' interests and stated that "[t]he views and representations advanced by these foreign governments are entitled to appropriate deference and weight. . . ." Letter from John H. Shenefield, Associate Attorney General, Department of Justice, to the Hon. Prentice H. Marshall, U.S. District Court Judge, dated May 6, 1980.

[12] A filing *amicus curiae*, consisting of material presented in other pending litigation, was submitted to the court below on behalf of the Government of Canada on May 23, 1980, more than three months before the decision below. The New Mexico Court denied leave to file on ground of timeliness and then apparently relied upon a diplomatic note forwarded to the trial court 18 months earlier for its purported understanding of the Canadian position. (J.S. App. 62a-63a n.49).

[13] In this case, the Supreme Court of New Mexico indicated its view that the act of state doctrine should not be applied by U.S. courts unless the Executive Branch states that the litigation has foreign policy implications for the United States. J.S. 61a-64a.

position of intermediary for the presentation of the views of foreign governments and should comment upon the foreign policy implications of the views so presented.

Accordingly, the issues as to procedures to be followed and the deference to be accorded the Canadian Government's official statements of the scope of its laws, policies and actions call for guidance by this Court.

CONCLUSION

Upon review of the decision below, this Court should resolve important issues of international law and comity—concerning the propriety of asserting jurisdiction over actions taken by Canadian uranium producers outside the United States and in accordance with Canadian law and policy; the propriety of imposing sanctions for failing to produce documents, production of which is prohibited by Canadian law; and the deference to be accorded Canada's official statements of the scope of its laws, policies and actions respecting the regulation of its uranium resource industry.

Respectfully submitted,

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